



## ISSUE

Whether appellant established that her failure to timely respond to a Demand for Tax Return (Demand Notice) for the 2014 tax year was due to reasonable cause and not due to willful neglect.

## FACTUAL FINDINGS

1. Appellant and her husband (collectively, the couple) did not file a timely California return for the 2014 tax year.<sup>4</sup> FTB received wage information indicating that her husband received sufficient income to require the filing of a 2014 return. FTB issued a Demand Notice to appellant's husband dated March 1, 2016, requesting that, by April 6, 2016, he file a 2014 return, provide FTB with a copy of his return if already filed, or provide an explanation as to why he was not required to file a 2014 return. The Demand Notice warned that, if appellant's husband did not timely respond, FTB would impose a demand penalty based on 25 percent of appellant's husband's total tax without taking into consideration any timely payments. FTB sent the Demand Notice to the Redlands, California address listed on the couple's 2013 return, which was their last-known address.
2. Appellant's husband failed to respond to the Demand Notice, so FTB issued a Notice of Proposed Assessment (NPA) dated May 2, 2016, in which FTB proposed an additional tax liability of \$6,486. The NPA also imposed a late-filing penalty of \$1,621.50, a notice and demand (demand) penalty of \$25,082.75 and a filing enforcement fee of \$79.00, plus applicable interest.
3. On May 13, 2016, the couple filed a 2014 California Resident Income Tax Return (FTB Form 540), on a married filing jointly basis. On that return, they reported federal adjusted gross income (AGI) of \$953,808, California adjustments (subtractions) of \$31, California AGI of \$953,777, claimed a standard deduction of \$7,984, and reported taxable income of \$945,793 and a total tax of \$90,459. After applying claimed California income tax withholding of \$58,845 and California estimated tax and other payments of \$35,000, the couple claimed an overpayment of \$3,386, which they requested be refunded to them. The couple listed the Redlands, California address on this return. FTB

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<sup>4</sup> Appellant's husband made an extension payment of \$35,000 on April 15, 2015.

accepted the couple's tax liability as reported on the return, but also imposed a revised demand penalty of \$22,614.75.<sup>5</sup>

4. While not directly at issue herein, appellant's husband also failed to timely file a return for 2010. On May 30, 2013, FTB issued a Demand Notice for appellant's husband to file a 2010 return. He did not timely respond to that Demand Notice, so FTB issued a NPA to appellant's husband for that year on September 3, 2013. (The record does not show whether a return eventually was filed for that year.)
5. In a letter dated May 25, 2016, appellant contended that she believed she had already filed the couple's 2014 return electronically. Appellant asserted that she used Intuit's ProSeries software to e-file her return and that she did not receive a rejection notice from her software provider. Appellant contended that she did not expect to receive any correspondence related to her return, because she claimed an overpayment on that return. Appellant also argued that she had suffered several misfortunes during 2015, including the loss of a portion of her CPA license, the loss of long-time business clients, and her son's serious illness (i.e., a brain tumor diagnosis in 2015) that required her son to be hospitalized. In her appeal letter appellant also contends that she did not receive the March 1, 2016 Demand Notice.
6. Appellant's tax returns for 2013, 2014, and 2015 were filed on a joint basis with her husband. They reflect wages of \$396,839, \$918,467, and \$969,601, respectively.
7. FTB issued an Income Tax Due Notice dated July 7, 2016, and a Final Notice Before Levy and Lien dated August 15, 2016. On August 30, 2016, the balance due was paid in full. FTB construed appellant's prior correspondence as a request for refund. This timely appeal followed.

### DISCUSSION

Respondent's determination is presumed to be correct, and a taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Myers*, 2001-SBE-001, May 31, 2001.)<sup>6</sup> Unsupported assertions are not sufficient to satisfy a taxpayer's burden of

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<sup>5</sup> The revised demand penalty was calculated by taking 25 percent of the couple's total reported tax liability of \$90,459 (i.e., 0.25 x \$90,459).

<sup>6</sup> Pursuant to California Code of Regulations, title 18, section 30501(d)(3), precedential opinions of the State Board of Equalization (BOE) that were adopted prior to January 1, 2018, may be cited as precedential

proof. (*Appeal of Magidow*, 82-SBE-274, Nov. 17, 1982.) A taxpayer's failure to produce evidence that is within his or her control gives rise to a presumption that such evidence, if provided, would be unfavorable to the taxpayer's case. (*Appeal of Cookston*, 83-SBE-048, Jan. 3, 1983.)

California imposes a penalty for the failure to file a return in response to a Demand Notice, unless the failure is due to reasonable cause and not willful neglect. (§ 19133.) The burden is on the taxpayer to prove that reasonable cause prevented her from responding to the demand. (*Appeal of James*, 83-SBE-009, Jan. 3, 1983.) The penalty is 25 percent of the tax assessed pursuant to section 19087 or of any deficiency tax assessed by FTB concerning the assessment for which the return was required. (§ 19133.) FTB will only impose the demand penalty for an unfiled return if the taxpayer fails to respond to a current Demand Notice and FTB has proposed an assessment under section 19087(a) after the taxpayer failed to timely respond to a Request for Tax Return or a Demand Notice at any time during the four taxable years preceding the year for which the current Demand Notice has been issued. (Cal. Code Regs., tit. 18, § 19133(b).) The demand penalty is designed to penalize a taxpayer's failure to respond to the demand, not a taxpayer's failure to pay the proper tax. (*Appeal of Bryant*, 83-SBE-180, Aug. 17, 1983.)

Here, it is undisputed that FTB issued a Demand Notice to appellant's husband dated March 1, 2016, and that he did not respond to the Demand Notice by the April 6, 2016 due date. Likewise, there is no dispute that appellant's husband previously failed to file a 2010 tax return in response to FTB's request for one, and FTB issued an NPA to appellant's husband for that year on September 3, 2013. Accordingly, FTB properly imposed the notice and demand penalty.

On appeal, appellant concedes that the couple's 2014 return must not have been filed, even though they thought they had timely filed that return on October 15, 2015. Appellant contends that the penalty should be abated on the ground that appellant had reasonable cause for failing to respond to the Demand Notice, and alleges that the couple had suffered several misfortunes during 2015, including the loss of a portion of her CPA license, the loss of long-time business clients, and a serious illness that required her son to be hospitalized. FTB's opening brief requested appellant to provide records establishing her son's illness and how it prevented

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authority to the Office of Tax Appeals unless a panel removes, in whole or in part, the precedential status of the opinion. BOE's precedential opinions are viewable on BOE's website:  
<http://www.boe.ca.gov/legal/legalopcont.htm>.

the couple from responding to FTB's Demand Notice. Appellant, however, has failed to provide such evidence. While we are sympathetic to the son's apparently serious health issues, we note that the health issues did not prevent the couple from earning \$969,601 in 2015. In other words, there is no evidence that their son's health issues continuously prevented the couple from responding to the 2016 Demand Notice. Consequently, we cannot conclude that the health issues constitute reasonable cause to abate the penalty.

Appellant also contends that the couple did not timely receive the Demand Notice. We note, however, that appellant's 2013 return dated October 15, 2014, listed an address in Redlands, California and that FTB sent the Demand Notice to that Redlands address on March 1, 2016. Therefore, FTB satisfied the requirement, set forth in section 18416, subdivision (b), that its notice be sent to the taxpayer's last known address. Moreover, appellant has not argued that the Redlands address to which the Demand Notice was mailed was incorrect. Indeed, appellant concedes that the couple received the May 2, 2016 NPA that was sent to the same Redlands address. Further, the couple filed their 2014 California tax return on May 13, 2016, using that Redlands address and used the Redlands address for this appeal. Therefore, appellant has failed to satisfy her burden of proving reasonable cause for her husband's failure to timely reply to the Demand Notice.

Finally, we note that although the Demand Notice was issued to appellant's husband and not to appellant, the general rule is that spouses filing a joint return are jointly and severally liable for the taxes reportable on that return, as well as any penalties relating thereto. (*Appeal of Sherwood*, 65-SBE-046, Nov. 30, 1965; *Appeal of Ewert*, 64-SBE-039, Apr. 7, 1964.) "Whenever a joint return is filed by spouses, the liability for the tax on the aggregate income is joint and several." (§ 19006(b).) Although in specified circumstances, a spouse may qualify as an "innocent spouse" and obtain relief from joint and several liability for tax and penalty amounts arising from a joint return (see § 18533; see also § 19006), no such claim has been made in this appeal. Accordingly, since husband's failure to respond to both a current and prior year's Demand Notice generated a liability for a demand penalty for 2014 pursuant to section 19133, when appellant chose to file a joint return with her husband for 2014 she became jointly and severally liable for that penalty.

HOLDING

Appellant failed to establish that her failure to timely respond to FTB's Demand Notice for the 2014 tax year was due to reasonable cause and not due to willful neglect.

DISPOSITION

Respondent's action in denying the claim for refund is sustained.

DocuSigned by:  
*Jeff Angeja*  
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Jeffrey G. Angeja  
Administrative Law Judge

We concur:

DocuSigned by:  
*Jeffrey I. Margolis*  
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Jeffrey I. Margolis  
Administrative Law Judge

DocuSigned by:  
*Teresa A. Stanley*  
0CC6C6ACCC6A44D...  
Teresa A. Stanley  
Administrative Law Judge